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No. 06-1140

IN THE
SUPREME COURT OF THE UNITED STATES

BONNIE WITTENBURG,
Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF *AMICI CURIAE* OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

MARISSA TIRONA
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94104
(415) 296-7629

THOMAS W. OSBORNE*
AARP FOUNDATION LITIGATION

MELVIN R. RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Marissa Tirona
Counsel for *Amicus Curiae*
NELA

*Counsel of Record
Counsel for *Amicus Curiae*
AARP

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INTEREST OF *AMICI CURIAE*[1/]

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Almost half of AARP's more than 38 million members are in the work force and are protected by the Age Discrimination in Employment Act (ADEA), Title VII, and various state laws, such as the Minnesota Human Rights Act, the statutes under which the causes of action at issue in this case arise. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

In this case, *Amici* are concerned primarily that the decision of the trial court, affirmed by the court below, improperly required the plaintiff to satisfy the preponderance of the evidence standard in order to avoid summary judgment. As a result of this decision, the ability of workers to vindicate their rights by trial has been severely undermined. *Amici* urge

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[1/] In compliance with Rule 37.6 of this Court, *Amici Curiae* AARP and NELA state that no counsel for any party authored this brief in whole or in part, and that no party or entity other than *Amici Curiae*, their members or counsel made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

the Court to grant the Petition so that it can reassert that the proper standard is that to defeat a motion for summary judgment, the plaintiff simply must show that there is a genuine issue of material fact, necessitating a trial. Unless this Court reverses the decision of the court below, employment discrimination plaintiffs like Ms. Wittenburg, whose cases almost always rely on circumstantial evidence, will find it nearly impossible to avoid summary judgment, leaving the playing field severely and unfairly tilted in favor of the alleged discriminators.

SUMMARY OF THE ARGUMENT

The affirmance by the Eighth Circuit of the grant of summary judgment for Respondent was erroneous because it was based on that court's confusing and legally incorrect articulation of the evidentiary standard that a plaintiff must satisfy to defeat a motion for summary judgment set forth in its earlier decision in *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894 (8th Cir. 2004), which was specifically relied on by the trial court. The decision below imposes an improperly high burden of proof on plaintiffs at the summary judgment stage of proceedings and should, therefore, be rejected by this Court. Under the proper standard, Ms. Wittenburg proffered sufficient evidence, including relevant ageist comments, to avoid summary judgment. Rather than evaluating that evidence as a whole, however, the court below considered it piecemeal and improperly rejected each individual item of evidence as insufficient to defeat summary judgment. Further, while this Court has concluded as a matter of law that the trier of fact is not permitted to draw an inference of age discrimination from the replacement of an older worker with one who is "insignificantly younger," given the closeness of the question of whether the age difference of six years in this case permits such an inference it is apparent that the court below failed to satisfy the requirements that it view the evidence in the light most favorable to the plaintiff and give plaintiff the benefit of all reasonable inferences.

I. THE COURT BELOW AFFIRMED SUMMARY JUDGMENT FOR DEFENDANT EVEN THOUGH THE TRIAL COURT'S DECISION WAS BASED ON AN IMPROPER STANDARD.

A. The *McDonnell Douglas* Burden-Shifting Proof Paradigm Did Not Change The Evidentiary Standard Applicable To Summary Judgment.

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment should be granted only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court has pointed out that in response to a properly supported summary judgment motion this rule requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a *genuine issue* for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). This requirement, however, "do[es] not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Additionally, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968), quoted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In other words, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. In determining whether summary judgment is warranted, the "evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The parties and the court below agreed correctly that for the trial of an employment discrimination case, such as this one, where the plaintiff relies on circumstantial evidence, the three step burden-shifting indirect method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies. In *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981), the Court described "the basic allocation of burdens and order of presentation of proof" prescribed by *McDonnell Douglas* in a discriminatory treatment case as follows:

> First the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving his prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-253. [Citations and internal quotations omitted].

In both *McDonnell Douglas* and *Burdine* the issues resolved by this Court arose in the context of a full bench trial, not on a motion for summary judgment. Thus, the proof paradigm prescribed in those cases describes the burdens required of the parties to prevail at trial, not their burdens at summary judgment, which are addressed by the Court's "summary judgment trilogy" of *Matsushita*, *Catrett*, and *Anderson* as described above. Indeed, in *Burdine*, the Court concluded that the burden placed on the plaintiff by the third

step of *McDonnell Douglas* "to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination," *Burdine*, 450 U.S. at 253, "now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256. Thus, the preponderance of the evidence standard generally required for plaintiffs to prevail at trial in other kinds of civil cases applies only to the plaintiff's "ultimate burden" under *McDonnell Douglas*.

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), another intentional discrimination case arising from a "full bench trial," *id.* at 505, the issue involved, not the summary judgment standard, but standard of proof at trial, *i.e.*, "whether [under the *McDonnell Douglas* framework]... the trier of fact's rejection of the employer's asserted reasons for the [employer's challenged] actions mandates a finding for the plaintiff." *Id.* at 504. The Court held that, rather than *compelling* a finding for plaintiff, "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* at 511.

Finally, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000), a case in which the Fifth Circuit had reversed a jury verdict for the plaintiff, this Court addressed the question "whether a plaintiff's prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." (citation omitted). Clarifying its holding in *Hicks*, the Court in *Reeves* held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. The Court then cautioned, however, that "[t]his is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability." *Id.* Pointing out that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law [pursuant to FED.R.CIV.P.50],

such that the inquiry under each is the same," *id.* at 150 [internal quotations and citations omitted], the Court did not purport to change that standard, but addressed the question of "what evidence a court is to consider in ruling on a Rule 50 motion." *Id.* at 149. The Court concluded that:

> in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.

Id. at 150 [citations and internal quotations omitted].

Therefore,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case that properly may be considered on a motion for judgment as a matter of law.

Id. at 148-49. Thus, *Reeves* clearly established that while the

plaintiff's ultimate burden at trial is to prove her case by the preponderance of the evidence, this standard is not applicable to either judgment as a matter of law or summary judgment.

Moreover, this Court in *Reeves* took great care to correct any misconceptions that may have arisen from *Hicks* by painstakingly explaining that the *McDonnell Douglas/Burdine/Hicks* proof scheme had not imposed a heightened proof standard for judgment as a matter of law [or summary judgment], *i.e.*, that while *McDonnell Douglas permits* a finding for plaintiff, such a finding is not *compelled*. The Court further explained that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases" from judgment as a matter of law. *Id.* at 148. To emphasize that its decision in *Reeves* had not altered this standard, this Court admonished "that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Id.*, quoting *Hicks*, 509 U.S. at 524.

Therefore, while the trial court must evaluate the evidence in accordance with the *McDonnell Douglas/Burdine/Hicks/Reeves* quartet of cases, the summary judgment standard established by the Court in the *Matsushita/Catrett/Anderson* trilogy remains unchanged. This conclusion is bolstered by the Court's language in *Anderson*, 477 U.S. at 252, stating thirteen years after *McDonnell Douglas* that on a motion for summary judgment, the trial judge's function is *not* to weigh the evidence and make credibility determinations to decide if the plaintiff has *proved* her case by a preponderance of the evidence, but to determine "whether reasonable jurors *could find* by a preponderance of the evidence that the plaintiff is entitled to a verdict - 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it." [emphasis supplied].

Indeed, in *Ryther v. KARE-11*, 108 F.3d 832, 838 (8th Cir. 1997) (*en banc*) the court concluded that after *Hicks*, "in all discrimination cases, the plaintiff must produce sufficient evidence of the elements of the prima facie case and where necessary, adduce sufficient proof of pretext to meet the *traditional tests* of summary judgment and judgment as a

matter of law." [emphasis supplied]. The decision below is, if anything, even more inexplicable because the *Ryther* holding is in complete agreement with *Hicks* and the subsequent guidance provided by this Court in *Reeves*.

B. The District Court Improperly Imposed The Preponderance Of The Evidence Standard At Summary Judgment.

In this case, the trial court, citing *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894 (8th Cir. 2004), granted summary judgment for defendant. Although Ms. Wittenburg argued on appeal that the trial court's reliance on *Kohrt* imposed an improperly high evidentiary standard at summary judgment, the Eighth Circuit failed to address the issue, simply holding that Ms. Wittenburg "failed to prove pretext in her age discrimination claim," *Wittenburg v. AEFA, Inc.*, 464 F.3d 831, 841 (2006), and that for lack of sufficient evidence her gender discrimination claim "also fails." *Id.* at 842. That decision, with its inherent reliance on the earlier *Kohrt* decision, however, misconstrues the standard of proof required of a plaintiff to avoid summary judgment. Because a plaintiff need not "prove pretext" to defeat a summary judgment motion, the decision misapplies the teaching of this Court in *Reeves*.

In *Kohrt*, a case in which the plaintiff sued his former employer alleging the he was fired because of his age in violation of the ADEA, the Eighth Circuit stated accurately that to avoid summary judgment, the plaintiff must present evidence that "(1) creates a question of material fact as to whether the defendant's proffered reasons are pretextual and (2) creates a reasonable inference that age was determinative factor in the adverse employment decision." *Id.* at 897. The very next sentence in *Kohrt*, however, unquestionably misstates the law. In that sentence, the court said: "Stated in simpler terms, in order to survive summary judgment, [plaintiff] 'must *prove by a preponderance of the evidence* that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.* [emphasis supplied], quoting its earlier decision in *Hitt v. Harsco Corp.*, 356 F.3d 920, 924 (8th Cir. 2004), which, in turn quoted *Reeves*, 530 U.S. at 143.

These two statements are irreconcilable because, as explained herein, the "preponderance of the evidence" standard applies to "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Burdine*, 450 U.S. at 253, quoted in *Reeves*, 530 U.S. at 143. It is unquestionably *not* applicable to summary judgment.

C. The Court Below Ignored The Trial Court's Reliance On The Improper Evidentiary Standard.

It is clear from the district court's rejection of Ms. Wittenburg's evidence as insufficient to avoid summary judgment that the conflicting statements of the law in *Kohrt* misled the district court to impose improperly on the plaintiff at summary judgment the preponderance of the evidence standard applicable to her "ultimate burden" under the burden-shifting proof scheme established in *McDonnell Douglas*. Nevertheless, the court below not only did not reverse the trial court, it did not even mention the issue. Instead, it stated that on *de novo* review its "task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory reason was pretextual," 464 F.3d at 836, without addressing whether pretext must be shown by a preponderance as required by *Kohrt*. Whether the court below intended to overrule *Kohrt sub silentio* or whether that incorrect decision remains applicable to all Eighth Circuit cases is unclear at best. What is clear is that the Eighth Circuit compounded the trial court's error by its piecemeal consideration and ultimate rejection of all of Ms. Wittenburg's evidence as insufficient to create a genuine issue of material fact and that whatever standard the court of appeals employed was misapplied. As clarified in *Reeves*, 530 U.S. at 148, the question at summary judgment[2/] is *not* whether the plaintiff proved pretext by a

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[2/] At issue in *Reeves* was the proper standard for judgment as a matter of law, but "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986)

preponderance of the evidence, but whether sufficient evidence was presented to create a genuine issue of material fact that would *permit* the trier of fact to make a finding of pretext. In fact, imposition of the preponderance of the evidence standard at summary judgment achieves the exact result that this Court stated its carefully crafted *Reeves* language was designed to prevent, *i.e.*, "effectively to insulate an entire category of employment discrimination cases from [summary judgment]." 530 U.S. at 148. In *Reeves*, of course, this Court's concern was that its holding in *Hicks*, should not be misinterpreted to compel summary judgment for plaintiffs. In this case, however, it is defendants rather than plaintiffs whom the decision below has inoculated against summary judgment by failing to reject *Kohrt*. Neither result is permissible under *Reeves*.

Additionally, the *Kohrt* requirement that the plaintiff must prove pretext by a preponderance of the evidence in order to survive summary judgment directly contradicts not only this Court's decision in *Reeves*, but also the Eighth Circuit's earlier holding in *Oldham v. West*, 47 F.3d 985 (8th Cir. 1995), a public sector Title VII[3/] retaliation case. In *Oldham*, although the trial court "correctly set forth the standard for summary judgment and the burden-shifting test used to establish retaliatory treatment" 47 F.3d at 988, it nevertheless granted summary judgment for the government because the plaintiff had failed to establish one element of his case, causation, by a preponderance of the evidence. *Id.* On appeal, the Eighth Circuit reversed, holding that "t]he fundamental error in the judge's analysis [was] that, on a motion for summary judgment, the plaintiff need not prove his case by a preponderance of the evidence, but merely need prove that a genuine issue exists as to one or more material facts." *Id.*

Other Circuits have reached the same conclusion. *See, e.g., Memberu v Allright Parking Systems, Inc.*, 93 Fed. Appx. 603, 606 (5th Cir. 2004) ("To survive summary judgment... the employee need only present sufficient evidence for a reasonable

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[3/] 42 U.S.C. § 2000e-5 *et seq.*

factfinder to infer discrimination.); *James v. New York Racing Ass'n*, 233 F.3d 149, 154 (2d Cir. 2000) ("[T]he standard for determining whether the evidence was sufficient to sustain the submission of the plaintiff's case to the jury was simply whether on the basis of that evidence, a factfinder could reasonably find the essential elements of a case of discrimination."); *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("But the question at summary judgment is not which of the possible explanations is most convincing, it is whether the plaintiff has produced enough evidence to raise a genuine issue of material fact regarding *her* explanation."); *Enlow v. Salem-Keizer Yellow Cab Co., Inc.*, 389 F.3d 802, 812-13 (9th Cir. 2004) ("When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.")

Reeves clarified that *Hicks* did not mandate a change in the summary judgment standard for employment discrimination cases. The court below erred by both failing to reject its earlier holding to the contrary in *Kohrt* and not being guided by its holding in *Oldham* that the preponderance of the evidence burden of proof does not apply to summary judgment. Thus, the confusing articulation of the summary judgment standard in *Kohrt* likely misled the district court here to require the plaintiff improperly to satisfy a higher evidentiary standard at summary judgment than this Court has permitted and one which the Eighth Circuit itself had emphatically rejected in *Oldham*. The Eighth Circuit's failure even to mention this issue is inexplicable. This Court should, therefore, grant the Petition to redress this fundamental error of law.

II. PLAINTIFF PRESENTED SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT.

Ms. Wittenburg presented a large quantity and variety of evidence in her effort to avoid summary judgment. She submitted several ageist comments, including one by the Chief

Investment Officer, who the court found was "a decision-maker," 464 F.3d at 837, and one by "a decision-maker in the initial phase of the downsizing." *Id.* She also provided evidence of several incidents, which she argued showed that AEFA treated younger employees more favorably than older workers. This evidence was submitted to counter AEFA's proffered legitimate, non-discriminatory reason for Ms. Wittenburg's termination in the November 2003 RIF: her low 2002 performance rating. In *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 807 (8th Cir. 2003), the court below stated that once the defendant has met this burden of producing a legitimate, non-discriminatory reason for the challenged action, pursuant to the second step of the *McDonnell Douglas* proof paradigm,

> [t]he presumption of discrimination [that arises from the plaintiff's prima facie case] disappears and [plaintiff] "can avoid summary judgment only if the evidence considered *in its entirety* (1) creates a fact issue as to whether the employer's proffered reasons are pretextual *and* (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision."

(Quoting *Rothmeier v. Inv. Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996) (emphasis supplied); *see Kohrt*, 364 F.3d at 897 (same). Additionally, in evaluating the evidence to determine whether it satisfies this standard, the court must view it in the light most favorable to the plaintiff and must give the plaintiff the benefit of all reasonable inferences. *Mayer*, 318 F.3d at 806. Further, the court must be "mindful 'that summary judgment should seldom be granted in the context of employment actions, as such actions are inherently fact based.'" *Id.* quoting *Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir. 1999). The court below failed in all three of these duties.

First, by considering each piece of evidence offered by Ms. Wittenburg individually, discounting that particular piece of evidence, and then moving on to consider and reject the next piece of evidence *seriatim*, the court below clearly did not step back and consider the evidence "in its entirety," as required by *Mayer*, *Rothmeier*, and *Kohrt*. Despite Ms. Wittenberg's extensive evidence, the court held that she "had failed to prove pretext in her age discrimination claim. 464 F.3d at 841. To the contrary, had this evidence been evaluated as a whole rather than piecemeal and under the proper standard, it should have been sufficient to avoid summary judgment.

Further, the court did not view the evidence in the light most favorable to the plaintiff. Rather, the court completely discounted Ms. Wittenburg's evidence, including the ageist comments of decision-makers. While each comment by itself may not have been sufficient to support an inference of discrimination and even though the comments were not made by the decisionmaker, nevertheless if evaluated together and viewed in the light most favorable to Ms. Wittenburg, those comments reflect that the decision to terminate her was made in "a corporate atmosphere unfavorable toward older employees," *Ryther*, 108 F.3d at 842, and along with her other evidence should have been sufficient to support an inference of age discrimination. *See Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 133 (3d Cir. 1997) (Ageist comments of unidentified senior executives made more than a year after the plaintiff was terminated (although totally unrelated to his termination) and which reflected a then-existing managerial attitude toward older workers or "corporate culture" "make the existence of an improper motive for [the plaintiff's] termination more probable.").

Other courts have rejected as inconsistent with the obligation to consider the evidence in its entirety the weighing of each individual item of evidence to determine if, by itself, it is sufficient to avoid summary judgment as the court below did here. For example, in *Futrell v. J.I. Case*, 38 F.3d 342 (7th Cir. 1994), the Seventh Circuit reversed the district court's grant of judgment as a matter of law for defendant after the jury had returned a verdict for the plaintiff. The court held that the

plaintiff had "presented a number of factors going beyond his own testimony" and that "[w]hile no one of these factors alone might sustain an age discrimination claim, their sum does permit a reasonable inference of age discrimination." *Id.* at 346. Similarly, in this case, Ms. Wittenburg does not rely merely on her own testimony, but has presented a "number of factors" that when considered together and viewed in the light most favorable to her permit a reasonable inference of age discrimination.

III. THE COURT BELOW ERRED IN HOLDING THAT AN AGE DIFFERENCE OF SIX YEARS BETWEEN MS. WITTENBURG AND ONE OF TWO EMPLOYEES TO WHOM HER WORK WAS DISTRIBUTED AFTER SHE WAS TERMINATED WAS INSUFFICIENT TO CREATE AN INFERENCE OF AGE DISCRIMINATION.

In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996), this Court concluded as a matter of law that the trier of fact is not permitted to draw an inference of age discrimination from the replacement of an older worker with one who is "insignificantly younger." Although the Court said that the fact that a replacement is "substantially younger than the plaintiff" can be a "reliable indicator of age discrimination," *id.*, the Court did not establish a minimum age difference, which would preclude the factfinder from drawing the inference. In this case, the court rejected Ms. Wittenburg's argument that pretext can be inferred because AEFA assigned two younger male analysts from another sector to work on technology stocks after she was terminated. 464 F.3d at 840.

Relying on its decision in *Schiltz v. Burlington N. R.R.*, 115 F.3d 1407, 1412-147 (8th Cir. 1997), in which it held that an age difference of five years was insufficient to raise an inference of discrimination, the court concluded as a matter of law that the two replacements were not "substantially younger" than Ms. Wittenburg because the largest age disparity between Ms. Wittenburg and one of them was six years. 464 F.3d at 840. The court completely ignored its later decision in

Hammer v. Ashcroft, 383 F.2d 722, 726 (8th Cir. 2004), in which it "assume[d] ... that the six-year age difference ... was sufficient to support a prima facie case" of age discrimination because the question of whether a six year age difference is substantial "is a close one, and one that is not entirely free from doubt." *Id.* at n. 3.

Other courts have also rejected the establishment of a bright line rule regarding what age differential is sufficiently "substantial" to permit the factfinder to draw the inference of discrimination. For example, in *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 996 (10th Cir. 2005), the Tenth Circuit concluded that even "a definitive five-year rule is unjustified. We are not convinced that all five-year age differences are the same." Given the acknowledgement in *Hammer* of the closeness of the question, it is apparent that the court failed to view the evidence in the light most favorable to the plaintiff and to give the plaintiff the benefit of all reasonable inferences. The question of whether the replacement was "substantially younger," properly resolved in plaintiff's favor, *does* permit an inference of discrimination.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

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Respectfully submitted,

Marissa Tirona
National Employment
Lawyers Association
44 Montgomery Street
Suite 2080
San Francisco, CA 94104

Counsel for *Amicus Curiae*
NELA

Thomas W. Osborne
AARP Foundation Litigation

Melvin R. Radowitz
AARP

601 E Street, NW
Washington, DC 20049

Counsel for *Amicus Curiae*
AARP